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No. 249.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

H. B. McFARLING, JOHN G. SCOTT, and MOUNTAIN VALLEY SALES CO., a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

EDWARD L. WRIGHT,
1025 Pyramid Building,
Little Rock, Arkansas,
ROBERT E. SCHLAFLY,
314 North Broadway,
St. Louis, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street CEntral 1-4477.

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The government's argument in opposition to the petition relies on an assertion of error in the instructions to deprive the verdict of validity. This assertion is unfounded and warrants a reply.

1. The Status of the Verdict.

The primary question is whether the reversal of the District Court judgment, on the separate charge of failure to comply with the dietary use regulations, nullifies the jury

verdict in favor of petitioners on the charge of misleading claims. The government's position, as stated in its brief, is that the Court of Appeals found an error in the labeling instruction which vitiated the jury verdict in its entirety. Consequently, it argues that the verdict in favor of petitioners on the charge of misleading claims is without validity, and that there has not been a valid adjudication of the charge of misleading claims.

Thus, the government does not rely on the established violation of Section 403 (j) as eliminating the verdict on the other issues submitted to the jury. It depends solely on an alleged error in the instructions to support the action taken by the Court of Appeals in nullifying the entire verdict. That position is demonstrably wrong.

The Verdict on Four Pamphlets Was Not Affected by Labeling Instructions.

Eight pamphlets were in evidence (Appendix C to petition, p. 29). The government must concede that the instruction in question—submitting the issue of labeling to the jury—did not apply to the four pamphlets which claimants, at the trial, admitted were labeling. (These four pamphlets contained the basic claims admittedly made for the product.) There was no instruction error invalidating the jury verdict on those four pamphlets, because the jury was instructed that they were labeling. See Instruction No. 5 set forth in R. Item 12, p. 299.

The impossibility of error, or confusion of the jury, in this respect is emphasized by the fact that the jury was given the eight pamphlets when it retired for deliberation. (See R. Item 12, pp. 304, 306.) Later, the jury asked, and was given, the specific titles and exhibit numbers of the four pamphlets which were admitted to be labeling and of the other four pamphlets which were denied to be labeling. (See R. Item 12, pp. 322-323.)

Even if the government were right in its contention that it was error to submit the issue of labeling to the jury, such error would apply only to the four pamphlets to which the labeling instruction was directed. The claimed error could not have affected the verdict on the four pamphlets which were conceded to be labeling, as the only question for the jury to decide as to them was whether the representations they contained were misleading. The verdict that the representations contained in those four pamphlets were not misleading is, therefore, free from any taint of error.

The elimination of the jury verdict on the misleading claims charge is supported by the government solely on the theory that an erroneous instruction on labeling vitiated the entire verdict. This theory must fail with respect to the four pamphlets which were admitted to be labeling, and which the trial court instructed the jury were labeling. These four pamphlets were outside the scope of the instruction now challenged by the government, because that instruction submitted the issue of labeling only with respect to the four other pamphlets, which the claimants denied were labeling. The government suggests no other basis for supporting the action of the Court of Appeals in nullifying the verdict with respect to the four pamphlets admitted to be labeling; and the government ignores the fact that the jury was instructed that these pamphlets were labeling (R. Item 12, p. 299).

The cases cited in the brief for the government (pp. 7-8) are not analogous in fact or in principle. None of them involved a jury verdict in favor of the claimant on one or more issues, so that the question of the effect of reversal on a separable ground did not arise. There was no jury in **United States v. Urbuteit** and the trial court entered judgment for the libelant on all issues. Similarly, no jury verdict was involved in **United States v. 62 Packages**. **Mar-**

mola and **United States v. One Device . . . Colonic Irrigator.** In **United States v. Six Dozen Bottles . . . Kuriko** and in **Goodwin v. United States** (under the 1906 Act), there were jury verdicts in favor of the government, which were affirmed on appeal.

These cases are beside the point, for they stand only for the proposition that a single finding of misbranding is sufficient to sustain a condemnation. That does not reach the question presented by this case, which is whether a judgment of violation of one section of the Act nullifies a jury verdict that other sections were not violated. The Court of Appeals held, contrary to the the Seventh Amendment, that the jury verdict that Sections 403 (a) and 502 (a) were not violated, "disappeared from the case". (Appendix A to petition, p. 17).

2. Costs in the District Court.

The government tacitly concedes that the District Court retains discretion in the allowance of costs under the statute. The error of the Court of Appeals in holding otherwise is exposed by this statement in the brief for the government (p. 9):

> "However, the District Court was told that it abused its discretion in basing the denial of costs on the verdict which had been nullified."

The fact is that the challenged order of the Court of Appeals does not tell the District Court that it has any discretion in the matter of costs. It implies the contrary (Appendices A, B to the petition, pp. 15, 19). The petition for rehearing in the Court of Appeals (R. Item 9, pp. 2-3) asked the court to leave the question of costs to the discretion of the District Court. The Court of Appeals denied this request without comment or explanation. (See R. Item 10.)

The fallacy of the government's position is its assumption that all costs must be assessed against the claimants unless they obtain a favorable verdict. If, as we contend, the District Court retains discretion in the matter, it is appropriate to deny costs related to the trial of those charges which the government failed to prove. The abandonment of irresponsible charges, or the failure to prove them, warrants an exercise of discretion on costs. In any event, the District Court cannot be precluded from exercising that discretion, although the effect of the Court of Appeals' order is to prevent it.

Conclusion.

For the foregoing reasons, and as set forth in the petition, we submit that the petition for a writ of certiorari should be granted.

EDWARD L. WRIGHT,
ROBERT F. SCHLAFLY,
Attorneys for Petitioners.

September, 1958.